STATE OF MINNESOTA
IN COURT OF APPEALS
A22-0550

In re City of Cohasset's Decision on the Need for an
Environmental Impact Statement for the Proposed Frontier Project.

Filed February 6, 2023
Reversed and remanded
Jesson, Judge
Concurring in part, dissenting in part, Johnson, Judge

City of Cohasset

Christopher Murray, Leech Lake Band of Ojibwe, Cass Lake, Minnesota; and

Joy R. Anderson, Melissa Lorentz, Minnesota Center for Environmental Advocacy, St. Paul, Minnesota (for relator Leech Lake Band of Ojibwe)

John M. Baker, Katherine M. Swenson, Greene Espel, P.L.L.P., Minneapolis, Minnesota (for respondent City of Cohasset)

Michael R. Drysdale, Dorsey & Whitney, L.L.P., Minneapolis, Minnesota (for respondent Huber Engineered Woods)

Jamie Konopacky (pro hac vice), Honor the Earth, Callaway, Minnesota; and

Joseph Plumer, Red Lake Legal Department, Red Lake, Minnesota; and

Frank Bibeau, 1855 Treaty Authority, Deer River, Minnesota; and

Antonio Solórzano (pro hac vice), White Earth Legal Department, White Earth, Minnesota (for amici curiae White Earth Nation, Red Lake Band of Chippewa Indians, 1855 Treaty Authority, and Honor the Earth)

Considered and decided by Johnson, Presiding Judge; Segal, Chief Judge; and Jesson, Judge.

SYLLABUS

Preparation of an environmental-impact statement is mandatory under Minnesota Rule 4410.4400, subpart 20 (2021), when a proposed project will eliminate a public waters wetland. Under Minnesota Statutes section 103G.005, subd. 15a (2022), public waters wetlands have two qualifying characteristics—wetland type and minimum acreage. A proposed project will eliminate a public waters wetland if it will deprive the public waters wetland of either of its two qualifying characteristics.

OPINION

JESSON, Judge

Respondent Huber Engineered Woods LLC hopes to build an oriented-strand-board manufacturing facility for which it will require permits from governmental entities including respondent City of Cohasset. After preparing a required environmental-assessment worksheet (EAW) in relation to the planned facility, the city decided that it was not necessary to prepare a more detailed environmental-impact statement (EIS). Relator Leech Lake Band of Ojibwe filed this certiorari appeal to challenge the city's decision not to prepare an EIS. The Band argues that the facility falls into categories for which an EIS is mandatory under governing administrative rules. Alternatively, the Band challenges the city's determination that the facility does not trigger the requirement that an EIS be prepared for a proposed project that has the potential for significant environmental effects.

As to the Band's first argument, we conclude that an EIS is required under Minnesota Rule 4410.4400, subpart 20, based on the elimination of a public waters

wetland, when a proposed project will deprive a public waters wetlands of either of its two qualifying characteristics—wetland type or minimum acreage—under Minnesota Statutes section 103G.005, subdivision 15a. And we conclude that the record lacks substantial evidence to support the city's determination that no public waters wetlands will be eliminated. As to the Band's alternative argument, we conclude that the record lacks substantial evidence to support the city's determination that the project does not have the potential for significant environmental effects through wetlands filling. We therefore reverse the city's decision, and we remand for the city to reconsider and issue a revised decision on whether an EIS is mandatory under Minnesota Rule 4410.4400, subpart 20, or required because of the potential for significant environmental impacts through wetlands filling.

FACTS

Huber's Proposed Oriented-Strand-Board Facility

Huber hopes to build an oriented-strand-board manufacturing facility west of the city.[1] The facility will occupy approximately 159 acres of agricultural and undeveloped lands adjacent to Minnesota Power's Boswell Energy Center and one mile east of the Leech Lake Indian Reservation. It will consist of an approximately 750,000-square-foot manufacturing plant; driveways, roads, and parking/loading/unloading areas; six thawing conveyers that will move logs from outside to inside for processing; two stormwater ponds;

[1] Oriented strand board is described in the record as "an engineered wood panel product comprised primarily of wood strands, wax, and resin and is typically used as a construction material for commercial and residential structures."

underground utility connections; and a rail spur to connect the project to an existing rail line along U.S. Highway 2.

The proposed facility met with a mixed reception. The governor and the legislature have supported the project. The legislature adopted, and the governor signed, legislation providing that a project like Huber's would not require an EIS solely based on the size of facility if the project received offers of financial incentives from the Minnesota Departments of Employment and Economic Development and Iron Range Resources and Rehabilitation during 2021. 2021 Minn. Laws 1st Spec. Sess. ch. 6, art. 2, § 129, at 1354. The record also reflects local support for the project, including from the mayor of Cohasset, who expressed enthusiasm for the jobs that would be provided by the project. But others, including individuals, organizations, and sovereign tribal nations, have expressed concerns about the potential environmental effects of the project. The Leech Lake Band, in particular, registered its objection to the project based on its proximity to reservation lands and its expected impacts on tribal resources in the area.

The record reflects that Huber's facility will have environmental impacts. Construction of the facility will involve permanently filling or excavating 26 of 31 wetlands that have been delineated at the project site. Most of the wetland impact will be attributable to filling for the rail spur, which will cross two large wetland complexes to the north of the facility. Among the wetlands that will be impacted by filling are two public

waters wetlands, which are accorded greater protection under state law.[2] Construction of the facility will increase the impervious surface area at the site from 1.6 to 54.1 acres.

When operational, the facility will have the capacity to manufacture 725,000,000 square feet of oriented-strand board annually. The facility will use primarily regionally harvested timber as feedstock for its product, although Huber may also obtain feedstock from the federal market, further reaches of Minnesota, Wisconsin, or other locations. At full capacity, the facility would consume approximately 400,000 cords of wood annually. The facility's production process will emit air pollutants, including nitrogen oxides and sulfur dioxide.

The City's Environmental-Review Process

In Minnesota, when a project will require governmental approvals, a responsible governmental unit must determine what level of environmental review is required under state statutes and administrative rules. Huber's facility will require multiple state permits and approvals, including National Pollutant Discharge Elimination System (NPDES) and air-emissions permits from the Minnesota Pollution Control Agency; approval of a wetlands replacement plan by Itasca County; and conditional-use and land-use permits

[2] Public waters wetlands are defined by Minnesota's Water Law as "all types 3, 4, and 5 wetlands, as defined in United States Fish and Wildlife Service Circular No. 39 (1971 edition), not included within the definition of public waters, that are ten or more acres in size in unincorporated areas or 2-1/2 or more acres in incorporated areas." Minn. Stat. § 103G.005, subd. 15a. "Public waters wetlands may not be drained, and a permit authorizing drainage of public waters wetlands may not be issued, unless the public waters wetlands to be drained are replaced by wetlands that will have equal or greater public value." Minn. Stat. § 103G.221, subd. 1 (2022).

from the city.[3] Therefore, it became necessary to determine what level of environmental review was required.

It is not disputed that Huber's facility, based on its size and other characteristics, required preparation of an EAW. *See* Minn. R. 4410.4300 (2021). At issue was whether it also required an EIS, either because it falls into a category for which preparation of an EIS is "mandatory," or because it has the potential to cause significant environmental effects. *See* Minn. Stat. § 116D.04, subd. 2a (2022); Minn. R. 4410.1700, subp. 1, .4400 (2021). That determination was to be made based on the information collected in preparing the EAW and the public comments on the EAW. *See* Minn. R. 4410.1700, subp. 3 (2021).

In September 2021, the city, acting as the responsible governmental unit,[4] provided public notice of an EAW for Huber's facility. After reviewing information and public comments received on the initial EAW, the city decided that additional information was

[3] The project will also require a federal Section 404 permit for dredging and filling in wetlands. 33 U.S.C. § 1344 (2019). The federal permitting process requires separate federal environmental review as well as a Section 401 water-quality certification from the Minnesota Pollution Control Agency. 33 U.S.C. § 1341(a) (2019).

[4] The city is the designated responsible governmental unit for preparation of an EAW triggered by facility size. *See* Minn. R. 4410.4300, subp. 14. Huber's project also triggers other categories for which an EAW is mandatory, and for which other responsible governmental units are designated. *See id.*, subps. 15, 27. When a project exceeds thresholds in two or more categories for which different responsible governmental units are designated, the responsible governmental unit is "the governmental unit with the greatest responsibility for supervising or approving the project as a whole." Minn. R. 4410.0500, subp. 5(B) (2021). When "it is not clear which governmental unit has the greatest responsibility for supervising or approving the project, the governmental units shall either: (1) by agreement, designate which unit is the [responsible governmental unit] . . . or (2) submit the question to the [Environmental Quality Board] chairperson . . . ." Minn. R. 4410.0500, subp. 5(B)(2). Although the record does not disclose the process through which the city was designated as the responsible governmental unit, it appears there was agreement to not submit the question to the chairperson.

necessary to determine whether an EIS was required. With the agreement of Huber, the city postponed the decision on the need for an EIS until March 8, 2022.

In January 2022, the city provided notice of a revised EAW and opened a second public-comment period. The revised EAW, which we refer to in this opinion as "the EAW," discusses various types of potential environmental effects of Huber's facility, including potential impacts from wetlands filling, air emissions, and timber harvesting. The EAW concludes, however, that the project does not have the potential for significant environmental effects. That conclusion is based in significant part on the mitigation expected to result from wetlands credits that Huber will be required to purchase through the state's wetlands banking program and from the anticipated conditions of permits that Huber will be required to obtain. During the public-comment period, the city received "45 distinct comments,"[5] including comments from the Minnesota Department of Natural Resources, the Minnesota Pollution Control Agency, and the Leech Lake Band.

On March 8, 2022, the city adopted responses to comments, together with findings of fact and a record of decision, determining that an EIS is not required for Huber's facility. The city concluded that Huber's facility did not exceed any of the mandatory EIS thresholds and did not have the potential for significant environmental effects that would trigger the need for an EIS.

The Leech Lake Band appeals.

[5] The comments included several thousand form emails received from individuals requesting that an EIS be prepared for the project. The city grouped these emails as one comment.

ISSUES

I. Is the city's determination that an EIS is not mandatory under governing administrative rules based on legal error and unsupported by substantial evidence?

II. Is the city's determination that Huber's facility does not have the potential for significant environmental effects supported by substantial evidence?

ANALYSIS

We begin by observing the nature and scope of our review in this certiorari appeal. The city's decision not to require an EIS is subject to our review under the appeal provisions of the Minnesota Administrative Procedure Act—Minnesota Statutes sections 14.63-.69 (2022). Minn. Stat. § 116D.04, subd. 10 (2022). We may reverse or modify the city's decision if it is, among other things, unsupported by substantial evidence. Minn. Stat. § 14.69. We "accord substantial deference" to the city's decision. *Citizens Advocating Responsible Dev. v. Kandiyohi Cnty. Bd. of Comm'rs*, 713 N.W.2d 817, 832 (Minn. 2006) *(CARD)*. Our deference does not extend, however, to the city's interpretation of governing statutes and rules, which we review de novo. *In re Reissuance of NPDES/SDS Permit to U.S. Steel Corp.*, 954 N.W.2d 572, 576 (Minn. 2021) *(U.S. Steel)*. As the relator, the Leech Lake Band has the burden to demonstrate a basis for reversal. *City of Moorhead v. Minn. Pub. Utils. Comm'n*, 343 N.W.2d 843, 849 (Minn. 1984); *Hazelton v. Comm'r of Dep't of Hum. Servs.*, 612 N.W.2d 468, 471 (Minn. App. 2000).

Before turning to the Leech Lake Band's arguments on appeal, we provide an overview of the statutory provisions governing environmental review under the Minnesota Environmental Policy Act—Minnesota Statutes sections 116D.01-.11 (2022). That act requires governmental entities to consider environmental consequences of proposed

projects before issuing permits or other authorizations. *CARD*, 713 N.W.2d at 823. Under the act and administrative rules adopted by the Minnesota Environmental Quality Board, a proposed project may require an EAW, an EIS, or both. *See* Minn. Stat. § 116D.04, subd. 2a(a) (requiring EIS for projects with potential for significant environmental effects); Minn. R. 4410.4300 (mandatory EAW categories); .4400 (mandatory EIS categories); *see also* Minn. Stat. § 116D.04, subd. 2a(b) (directing Environmental Quality Board to adopt rules identifying such categories). For each mandatory EIS and EAW category, the rules designate a responsible governmental unit that is charged with completing the required review. Minn. R. 4410.4300, .4400.

An EIS may be required under the Minnesota Environmental Policy Act for one of two reasons. First, an EIS is required if the characteristics of a proposed project exceed one or more of the mandatory EIS thresholds in Minnesota Rule 4410.4400. Minn. Stat. § 116D.04, subd. 2a(b). For example, an EIS is mandatory for the construction of any new petroleum refinery facility; hazardous waste facilities with certain characteristics; and residential developments of certain sizes. *See* Minn. R. 4410.4400, subps. 4, 12, 14. Second, an EIS is required—even if the proposed project does not exceed any mandatory EIS threshold—if the proposed project has the potential for significant environmental effects. Minn. Stat. § 116D.04, subd. 2a(a).[6]

[6] The governing administrative rules refer to an EIS required under this standard as a "discretionary EIS." Minn. R. 4410.2000, subp. 3 (2021). But a responsible governmental unit has no discretion to avoid preparation of an EIS when the standard is met.

An EIS "describes the proposed action in detail, analyzes its significant environmental impacts, discusses appropriate alternatives to the proposed action and their impacts, and explores methods by which adverse environmental impacts of an action could be mitigated." Minn. Stat. § 116D.04, subd. 2a(a). An EAW—which precedes a potential EIS—serves one of two purposes. When a proposed project exceeds a mandatory EIS threshold, an EAW is prepared as a scoping document "to facilitate the delineation of issues and analyses to be contained in the EIS." Minn. R. 4410.2100, subp. 2 (2021). But when a proposed project does not exceed any mandatory EIS threshold, the EAW is "a brief document which is designed to set out the basic facts necessary to determine whether an [EIS] is required for a proposed action." Minn. Stat. § 116D.04, subd. 1a(c); *see also* Minn. R. 4410.1000, subp. 1 (2021).

In these circumstances, an EAW must identify "potential environmental impacts" including "cumulative potential effects." Minn. R. 4410.1200(E) (2021). An EAW should also discuss "known governmental approvals, reviews, or financing required, applied for, or anticipated and the status of any applications made, including permit conditions that may have been ordered or are being considered." *Id.* (F) (2021). But an EAW need not include all information that may later be required to obtain permits for the project. *See* Minn. Stat. § 116D.04, subd. 15.

After an EAW is prepared, the responsible governmental unit must distribute it and open a 30-day public-comment period. Minn. R. 4410.1500-.1600 (2021). Then, if an EIS is not mandatory under the rules, the responsible governmental unit must issue a decision on the need for an EIS based on the information gathered during the EAW process and the

comments received on the EAW. Minn. R. 4410.1700, subp. 3. In determining whether a proposed project requires an EIS because it has the potential for significant environmental effects, a responsible governmental unit must consider:

- the "type, extent, and reversibility of environmental effects";
- "cumulative potential effects";
- "the extent to which the environmental effects are subject to mitigation by ongoing public regulatory authority"; and
- "the extent to which environmental effects can be anticipated and controlled as a result of other available environmental studies undertaken by public agencies or the project proposer, including other EISs."

Minn. R. 4410.1700, subp. 7 (2021).

With this understanding of the governing statutes and administrative rules in mind, we turn to the arguments advanced by the Leech Lake Band. We first consider challenges to the city's determination that an EIS is not mandatory under Minnesota Rule 4410.4400. We then address challenges to the city's determination that Huber's facility does not have the potential for significant environmental effects.

I. The city's determination that an EIS was not mandatory under governing administrative rules is based on legal error and unsupported by substantial evidence.

The Leech Lake Band challenges the city's determination that an EIS is not required for the project under Minnesota Rule 4410.4400, subpart 20.[7] Under that rule, an EIS is

[7] The Leech Lake Band also asserts that the record lacks substantial evidence to support the city's determination that an EIS was not required under Minnesota Rule 4410.4400, subpart 11 (requiring preparation of EIS for industrial facilities that exceed certain size

mandatory when a project "will eliminate a public water or public waters wetland." *Id.* "Public waters wetlands" are defined by statute as "all types 3, 4, and 5 wetlands . . . not included within the definition of public waters, that are ten or more acres in size in unincorporated areas or 2-1/2 or more acres in incorporated areas." Minn. Stat. § 103G.005, subd. 15a; *see also* Minn. R. 4410.0200, subp. 70 (2021).

The EAW explains that construction of the facility will involve filling portions of two public waters wetlands: 8.73 of 14.27 acres of Wetland No. 26 and 1.65 of 5.67 acres of Wetland No. 27. The EAW nevertheless concludes that "[t]he proposed permanent wetland impacts will result in a reduction in size but not the elimination of a public waters wetland, and therefore do not trigger a mandatory EIS." And in responding to comments on the EAW, the city stated that the public waters wetlands would not be eliminated because their wetland type would not change, and they would remain above the required acreage to be considered public waters wetlands.

The Leech Lake Band argues that construction of the facility could eliminate public waters wetlands if the partial filling causes them to become different types of wetlands that

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thresholds). We disagree. The legislature adopted an exemption to that rule in a 2021 session law that applies to a business entity that proposes "to build an engineered wood product manufacturing facility in Itasca County" and "receives a written offer of financial incentives from both the Department of Employment and Economic Development and the Department of Iron Range Resources and Rehabilitation anytime during 2021." 2021 Minn. Laws 1st Spec. Sess. ch. 6, art. 2, § 129, at 1354. The record contains financial-incentive terms sheets proposed by both departments that provide substantial evidence to support application of the exemption. And we are not persuaded by the Leech Lake Band's argument that the session law required a more final offer before the exemption could apply. *See*, *e.g.*, *The American Heritage Dictionary of the English Language* 1222-23 (5th ed. 2011) (defining the noun "offer" as "[s]omething, such as a suggestion, proposal, bid, or recommendation, that is offered").

do not meet the definition of public waters wetlands. And the Band further asserts that the city's determination that the wetlands will not change types is unsupported by substantial evidence.

To resolve the parties' arguments on this issue, we first determine what it means to "eliminate" a public waters wetland under Minnesota Rule 4410.4400, subpart 20. And we then evaluate whether there is substantial evidence in the record to support the city's determination that an EIS is not required under the rule based upon that interpretation.

A. An EIS is required under Minnesota Rule 4410.4400, subpart 20, when a project will deprive a public waters wetland of either of its two qualifying characteristics.

When interpreting administrative rules, we apply the same standards that govern the interpretation of statutes. *See U.S. Steel*, 954 N.W.2d at 576; Minn. Stat. § 645.001 (2022). We refer to the common meaning of words and evaluate them in the context that they are used. *Broadway Child Care Ctr., Inc. v. Minn. Dep't of Hum. Servs.*, 955 N.W.2d 626, 631 (Minn. App. 2021). When the meaning of a rule is clear, we apply that plain meaning. *U.S. Steel*, 954 N.W.2d at 576; Minn. Stat. § 645.16 (2022). When terms are not defined by a rule, we may consult dictionary definitions, but dictionary definitions are not binding if context suggests a different meaning. *State v. Gibson*, 945 N.W.2d 855, 858 (Minn. 2020). Only when a rule is ambiguous—meaning that there is more than one reasonable interpretation—may we "resort to the canons of statutory construction to determine its meaning." *U.S. Steel*, 954 N.W.2d at 576 (quotation omitted); *see also* Minn. Stat. § 645.16. And consideration of rulemaking history is "not appropriate when . . . language is unambiguous." *Juntunen v. Carlton County*, 982 N.W.2d 729, 745

n.6 (Minn. 2022); *see also* Minn. Stat. § 645.16(2) (listing "the circumstances under which [a law] was enacted" as among factors that may be considered when "the words of a law are not explicit").[8]

Neither Minnesota Rule 4410.4400, subpart 20, nor the governing definitions rule, Minnesota Rule 4410.0200 (2021), explains what it means for a project to "eliminate" a public waters wetland. The rule could be interpreted as applying only when a project will completely fill public waters wetlands.[9] But when we consider the context in which the term is used, we conclude that its meaning is plain. "Eliminate" modifies "public waters wetland," and a "public waters wetland" has two characteristics. First, it must be a particular wetland type—type 3, 4, or 5—as determined by the nature of its waters and vegetation. Minn. Stat. § 103G.005, subds. 15a, 17b (2022). Second, it must occupy a certain acreage—ten or more acres in an unincorporated area or 2-1/2 or more acres in an incorporated area. *Id.*, subd. 15a. Given this context, it stands to reason that a proposed

[8] When an agency interprets its own rule, we will defer to its reasonable interpretation of an ambiguous rule. *St. Otto's Home v. Minn. Dep't of Hum. Servs.*, 437 N.W.2d 35, 40 (Minn. 1989). Because the rule at issue was adopted by the Environmental Quality Board, and not the city, this rule of deference does not apply here.

[9] The city in parts of its brief seems to advocate for such an interpretation, relying on dictionary definitions to suggest that only complete filling of a public waters wetland can eliminate it. *See*, *e.g.*, *The American Heritage Dictionary of the English Language* 579 (5th ed. 2011) (defining "eliminate" to mean "[t]o get rid of; remove"). But we consider our interpretation to be consistent with the dictionary definition. If, before a project, there is a public waters wetland, and after a project there will no longer be a public waters wetland, then the project has gotten rid of it or removed it. This is true whether the elimination results from complete filling or actions that cause the wetland to become a different type that does qualify as a public waters wetland. Moreover, even if it were inconsistent with dictionary definitions, our contextual interpretation would govern. *See Gibson*, 945 N.W.2d at 858.

project that will deprive a public waters wetland of either of its qualifying characteristics will eliminate that public waters wetland within the meaning of Minnesota Rule 4410.4400, subpart 20. Put another way, a public waters wetland is not "eliminated"—requiring an EIS—only when a project causes a wetland to entirely disappear. Rather, if the wetland remaining after a project will no longer qualify as a type 3, 4, or 5 wetland or will encompass less than 2-1/2 acres in an incorporated area, the project will eliminate a public waters wetland.[10]

Based on our interpretation, we hold that an EIS is mandatory under Minnesota Rule 4410.4400, subpart 20, when a project will deprive a public waters wetland of either of its two qualifying characteristics under Minnesota Statutes section 103G.005, subd. 15a. Still, the city asserts that, even under this interpretation, an EIS is not required for Huber's facility. The Leech Lake Band argues that this assertion is not supported by substantial evidence. We thus turn our attention to a substantial-evidence analysis.

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[10] This reasoning is consistent with that of the district court in *Minn. Ctr. for Env't Advoc. v. Big Stone Cnty. Bd. of Comm'rs (Big Stone)*, 638 N.W.2d 198, 204 (Minn. App. 2002), *rev. denied* (Mar. 27, 2002). In that case, we concluded that the district court erred in applying an exemption under Minnesota Rule 4410.4600, subpart 1 (1999). *Id.* We explained that the district court had determined that a wetland would be "eliminated as a Type-5 wetland and will become an unprotected Type-2 wetland and recognized that an EIS is mandatory for 'projects that will eliminate a protected water.'" *Id.* at 203-04 (quoting Minn. R. 4410.4400, subp. 20 (1999)). But we did not address whether that was an accurate interpretation of the term "eliminate" in Minnesota Rule 4410.4400, subpart 20. Rather, we reasoned that the district court, having determined an EIS was mandatory under the rules, erred by determining that the exemption rule controlled. *Id.* at 204. We now reach the issue that only the district court addressed in *Big Stone*.

B. The record lacks substantial evidence to support the city's determination that no public waters wetlands will be eliminated.

When we review an administrative decision for the support of substantial evidence, we engage in a two-part inquiry, asking (1) "whether the agency has adequately explained how it derived its conclusion," and (2) whether that conclusion is "reasonable on the basis of the record." *In re NorthMet Project Permit to Mine Application*, 959 N.W.2d 731, 749 (Minn. 2021) *(NorthMet)* (quotations omitted), *reh'g denied* (Minn. June 15, 2021). A decision is supported by substantial evidence when there is "relevant evidence that a reasonable mind might accept as adequate to support a conclusion, and more than a scintilla, some, or any evidence." *Id.* (quotations omitted). But when an agency makes "conclusory statements," with "no analysis of [their] scientific basis," substantial evidence is lacking. *Id.* at 753.

Here, the city explains that an EIS was not mandatory under Minnesota Rule 4410.4400, subpart 20, because the partially filled public waters wetlands would not change type and would remain above the minimum acreage to be considered the public waters wetlands. In support of this conclusion, the city relies on the following statements in its responses to comments:

> The type and function of the remaining acreage of the Public Waters wetlands will not change, because excess stormwater will be appropriately managed under the facility's NPDES permit. In addition, both of the Public Waters wetlands on the site lie within incorporated areas of the City of Cohasset, and will not fall below the 2.5 acre threshold after the partial filling associated with the Proposed Project.

The Leech Lake Band argues that the city's statements are conclusory and do not satisfy the substantial-evidence standard. We agree. The city flatly proclaims that construction of the facility will not change the condition of the wetlands, but it points to no scientific analysis supporting this proclamation. And, although the city relies on conditions expected to be included in a NPDES permit to be issued by the Minnesota Pollution Control Agency, it does not explain how those permits will prevent the public waters wetlands from changing type.[11] In contrast, the Leech Lake Band points to analyses by the Minnesota Pollution Control Agency and the federal Environmental Protection Agency indicating that stressors, including industrial development and elimination of surrounding wetlands, can adversely affect the condition of remaining wetlands.[12] Particularly in light of this countervailing evidence, the city's statements are the type of "conclusory statements" that

[11] An NPDES permit is required to discharge pollutants into navigable waters. *See* 33 U.S.C. §§ 1311, 1342(a) (2019). And it must include conditions necessary for navigable waters to meet the state's water-quality standards. *See* 40 C.F.R. § 122.44(d)(1); Minn. R. 7001.0140 (2021). Although water quality certainly bears some relationship to wetland condition, the city does not explain how permit conditions targeted to water quality will ensure that filling and other activities will not result in changes to wetlands type. In contrast, the city's analysis of the required air-emissions permit explains the direct control that the permit will have over the facility's air emissions.

[12] The city points out that the EPA analysis, posted to its website, is outside of the administrative record. We conclude that the EPA's analysis is a matter of public record that we may rely on to inform our review. *See In re Est. of Turner*, 391 N.W.2d 767, 771 (Minn. 1986) (denying motion to strike extra-record public report; explaining "we see no reason why a party may not submit such a report to us as part of its brief when we could refer to such a report in the course of our own research, if we were so inclined"); *see also White v. Minn. Dep't. of Nat. Res.*, 567 N.W.2d 724, 735 (Minn. App. 1997) (explaining that evidence outside the administrative record may be considered when "additional evidence is necessary to explain technical terms or complex subject matter involved in the agency action" or "the agency failed to consider information relevant to making its decision"), *rev. denied* (Minn. Oct. 31, 1997).

do not constitute substantial evidence. *NorthMet*, 959 N.W.2d at 749, 753-54 (holding that substantial-evidence test was not met when record was "devoid of any evidence" to support scientific conclusion and contested-case petitions contained "bevy of evidence" supporting contrary conclusion); *see also CARD*, 713 N.W.2d at 837 (explaining that "bare assertions" could not provide substantial evidence to support determination that project would have no cumulative potential effects); *In re Appeal of Selection Process for Position of Electrician*, 674 N.W.2d 242, 250 (Minn. App. 2004) (holding that "entirely conclusory" staff reports were insufficient to support commission's decision).

In sum, we hold that an EIS is required under Minnesota Rule 4410.4400, subpart 20, based on the elimination of a public waters wetland, if a project will deprive a public waters wetland of either of its qualifying characteristics under Minnesota Statutes section 103G.005, subdivision 15a. And we conclude that the city's conclusory determination that Huber's facility will not change the character of impacted public waters wetlands is unsupported by substantial evidence. We therefore reverse the city's decision not to require an EIS, and we remand for the city to issue a new EIS decision, applying the correct legal standard on a properly developed record, to determine whether an EIS is mandatory under Minnesota Rule 4410.4400, subpart 20.

II. The city's decision that an EIS was not required based on the potential for significant environmental effects is, in part, unsupported by substantial evidence.

In the alternative, the Leech Lake Band challenges the city's determination that construction and operation of Huber's facility does not have the potential for significant

environmental effects that would require an EIS.[13] The Band argues that even if an EIS is not mandatory it is nevertheless required because the city failed to consider the potential environmental impacts of the facility on tribal resources. And it identifies three categories of potential environmental impacts—wetlands, air emissions, and timber harvesting—for which it asserts the record falls short of supporting the city's determination of no significant environmental effects. We address those categories in turn, inquiring into whether the city has explained the bases for its conclusions and whether those conclusions are reasonable based on the record. *See NorthMet*, 959 N.W.2d at 749.

But before turning to that substantive analysis, we address an argument raised by the Leech Lake Band regarding its role in these proceedings. The Band asserts that, as a

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[13] The Leech Lake Band also asserts that the city's decision on this issue is arbitrary and capricious, and that the city failed to take a "hard look" at the issues that is required by the caselaw. *See, e.g.*, *Cable Commc'ns Bd. v. Nor-West Cable Commc'ns P'ship*, 356 N.W.2d 658, 669 (Minn. 1984). The arbitrary-and-capricious arguments largely track the substantial-evidence arguments, except that the Leech Lake Band argues that, by failing to specifically address in the EAW the Band's treaty resources, the city "entirely failed to consider an important aspect of the problem." Amici curiae White Earth Nation, Red Lake Band of Chippewa Indians, 1855 Treaty Authority, and Honor the Earth similarly assert that the city "utterly failed to assess potentially significant impacts to treaty rights and tribal people." Although a section specifically related to treaty resources in the EAW might be preferable, we note that the form worksheet provided by the Environmental Quality Board does not include such a section. More fundamentally, however, the record reflects that the city did address the concerns about treaty resources in the responses to comments on the EAW. Thus, we reject the argument that the city entirely failed to consider an important aspect of the project.

The Leech Lake Band's "hard look" argument is based on statements made by the city's mayor regarding the expected economic benefits of Huber's facility. But the mayor also committed to doing the due diligence required before approving the facility. Understood in this context, the mayor's comments do not demonstrate that the city failed to take a "hard look" at the potential environmental impacts of the facility.

sovereign nation with environmental expertise, it should be "given deference" and its comments "should be given weight similar to other governmental agencies." The city disputes that "deference" is owed but acknowledges that federal caselaw has called for treating tribal comments in this context with "appropriate solicitude." *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 985 F.3d 1032, 1044 (D.C. Cir. 2021). And counsel for Huber at oral argument stated that Huber did not have a concern with giving tribal comments consideration equal to other governmental entities, to the extent that there is demonstrated expertise.

Minnesota is home to 11 federally recognized Indian Tribes, and the state "acknowledges and supports the unique status of the Minnesota Tribes and their absolute right to existence, self-governance, and self-determination." Minn. Stat. § 10.65, subd. 1 (2022). Based on the Leech Lake Band's sovereign status and environmental expertise, we accord significant weight to its comments on the EAW and arguments in this appeal.[14]

A. The record lacks substantial evidence to support the city's determination that the facility does not have the potential to cause significant environmental effects through wetlands removal.

The Leech Lake Band first asserts that substantial evidence does not support the city's determination that wetlands removal during construction of the facility will not have

[14] The record reflects that the Leech Lake Band actively manages reservation lands and waters to protect its members' health. And the Band's detailed comments in this matter were prepared by the Band's Director of Resource Management, an executive-branch official of the Leech Lake Band. Neither respondent here disputes the Leech Lake Band's expertise in the environmental issues relevant to this appeal.

the potential for significant environmental effects. The record contains the following information regarding the potential environmental impacts of wetlands removal.

The EAW describes the planned wetlands filling and compensatory mitigation measures (through wetlands credits). The EAW does not expressly conclude that the proposed wetlands filling will not have the potential for significant environmental impacts, although it does conclude that "impacts to wetlands at the project site are not expected to interact meaningfully with wetland impacts elsewhere in the watershed to create a cumulatively significant impact."

In its comment on the EAW, the Leech Lake Band explained that the wetlands Huber plans to fill are a filter for water quality, which nearby wild-rice beds depend upon. The Band's specific concerns about this impact on downstream resources, including a wild-rice bed, are as follows:

> The Army Corps wetlands delineation indicates that the wetlands that are proposed to be filled have a direct hydrological connection to the large "Blackwater" wild rice bed along the Mississippi River adjacent to and immediately downstream of the proposed Huber site. It is a popular location for Tribal and non-Tribal ricers every year. . . . The wetlands that Huber proposes to fill are currently a filter for water quality. Removing the wetland filters and replacing them with industrial development will be harmful to the water quality that the rice depends upon to flourish.

The Leech Lake Band also asserted that Huber's planned mitigation efforts would be inadequate to protect the Blackwater wild-rice bed:

> Huber is proposing wetlands banking to mitigate the loss of wetlands, but wetlands that are many miles away will not prevent harm to wild rice at this location on Blackwater Creek. Instead, the loss of wetlands will result [in] a direct loss of

> wetland filtering and substantially more industrial stormwater runoff into an important wild rice gathering area. Wild rice requires high transparency waters in order to thrive.

The Minnesota Pollution Control Agency and the Minnesota Department of Natural Resources also commented on wetlands removal. The Minnesota Pollution Control Agency commented:

> The EAW should have described the sequencing steps used to avoid and minimize wetland impacts when choosing this wetland dominated property for the Project. For instance, could the rail spur [have] avoided or minimized impacts to the wetlands by accessing the proposed facility on the southeast side of the wetlands or aligning the rail spur closer to Highway 6. Wetlands play an important role in watershed health and purchasing credits (even in the same service area) will not provide the same local water quality and wildlife benefits as creating wetlands on site.

And the Minnesota Department of Natural Resources noted: "Significant wetland filling and crossing is outlined in the EAW, though the site is directly adjacent to other roads. . . . Feasibility of an alternative (e.g., routing the rail spur along highway 6) should be discussed . . . ."

In its responses to Leech Lake Band's comments on the EAW, the city pointed to future permit controls and wetland credits as mitigation, stating as follows:

> Stormwater controls will be implemented under the facility's NPDES permit to prevent damaging runoff to adjacent wetlands and wild rice resources. Regarding wetland function, [the Leech Lake Band] is correct that some wetlands on site would be filled, but by state statute these would be mitigated at 1.5 times the otherwise applicable regulatory rate, more than offsetting the degree of filling. [The Leech Lake Band] claims that mitigation occurring miles away will not be beneficial to [the Leech Lake Band's] concerns, but the mitigation credits to

> be exercised will be in the same immediate watershed, and indeed on [the Leech Lake Band's] reservation land.

In response to the Minnesota Pollution Control Agency comment, the city stated: "Wetland avoidance and minimization of impacts is discussed in detail in the wetland replacement plan application, which has been separately subject to public and agency review and comment. This document had not been finalized before the EAW comment period." And in response to the Minnesota Department of Natural Resources comment, the city stated: "Alternatives and mitigation are addressed in the wetlands replacement plan application."

Having carefully reviewed the record on this issue, we conclude that the city's determination—that there is no potential for significant environmental effects from wetlands removal—is unsupported by substantial evidence. The Leech Lake Band raised specific concerns about the potential environmental impact of the particular wetlands removal that will be caused by the project—including a perceived threat to the viability of the Blackwater wild-rice bed. These concerns were echoed by both the Minnesota Pollution Control Agency and the Minnesota Department of Natural Resources. As we explain above, we accord significant weight to the Leech Lake Band's concerns. We are also mindful that wild rice, in addition to being Minnesota's official state grain, holds substantial cultural importance to Minnesota's tribes. Minn. Stat. § 1.148 (2022).

In response to the Leech Lake Band's concerns about the Blackwater wild-rice bed and other local resources, the city reiterated that wetlands removed during construction of Huber's facility will be replaced by other wetlands and asserted that stormwater controls

under the facility's NPDES permit will prevent damaging run-off to remaining wetlands. But the record reflects no scientific analysis of this issue. This lack of record evidence stands in stark contrast to the record developed regarding timber harvesting, which we discuss below.

The city apparently did not investigate—and certainly does not explain—*how* wetlands replacement and permit controls will protect the Blackwater wild-rice bed and other resources downstream from potential impacts caused by wetlands removal during construction of the facility. And the Minnesota Pollution Control Agency's comment unequivocally states that "purchasing credits (even in the same service area) will not provide the same local water quality and wildlife benefits as creating wetlands on site." The city's determination that there is no potential for significant environmental effects through wetlands removal is not reasonable based on this record. *NorthMet*, 959 N.W.2d at 749.

Our conclusion that the city's determination regarding wetlands removal is unsupported by substantial evidence provides an additional basis on which we reverse the city's decision not to require an EIS and remand for a new EIS decision. On remand, the city shall reconsider and issue a revised decision on the need for an EIS based on the potential environmental impacts of wetlands removal. If the city determines that it lacks information necessary to make a reasoned decision on this issue, it will have the option to either order the preparation of an EIS or postpone the decision on the need for an EIS, with Huber's agreement, until the information can be obtained. *See* Minn. R. 4410.1700, subp. 2a (2021).

B. Substantial evidence supports the city's determination that the project does not have the potential to cause significant environmental effects through air emissions.

The Leech Lake Band next asserts that substantial evidence does not support the city's determination that air emissions from the facility will not have the potential for significant environmental effects. On this issue, the record reflects the following.

The EAW addresses expected air emissions from the project, notes that Huber will require an air-emissions permit under the federal Clean Air Act from the Minnesota Pollution Control Agency, details the testing that will be required during the permitting process, and concludes: "These analyses will demonstrate that the proposed facility will not have an adverse impact on ambient air quality. The [air-emissions] permit cannot be issued without such a determination." The Minnesota Pollution Control Agency, which is charged with regulating air emissions, did not comment on this section of the EAW.

In its comment on the EAW, the Leech Lake Band asserted that the sheer volume of emissions required an EIS and that the project will emit two pollutants—nitrous oxides and sulfur dioxide—that can combine to create acid rain. The Band expressed concerns about the impact of deposits of sulfides on rice-growing waters, noting that "[s]treams and wetlands that have high concentrations of dissolved sulfide in the sediment have a low probability of hosting wild rice." In contrast to its analysis of wetlands removal, however, the Leech Lake Band does not explain how the mitigation identified by the city will be insufficient.

In responses to comments on the EAW, the city reiterated that the Minnesota Pollution Control Agency's permitting process will ensure that the project complies with

the National Ambient Air Quality Standards (NAAQS), which are designed to "protect public health, with an adequate margin for safety" and "provide public welfare protection, including protection against decreased visibility and damage to animals, crops, vegetation, and buildings." The city emphasized that the proposed project "is required to go through rigorous review before an air emissions permit to construct and operate may be issued." In response to the Leech Lake Band's concerns about acid rain impacting wild rice, the city noted that, because of air dispersion, "it is very unlikely that any very limited contribution to acid deposition that may arise from [Huber's] facility will occur on those resources in close proximity to the facility."

Based on our careful review of the record on this issue, we conclude that the city's determination—that there is no potential for significant environmental effects from air emissions—is supported by substantial evidence. The city explained the reasons for its conclusion and that explanation is "reasonable on the basis for the record." *NorthMet*, 959 N.W.2d at 749. Specifically, the city reasonably relied on the anticipated ongoing regulatory authority of the Minnesota Pollution Control Agency over air emissions from Huber's project. *See* Minn. R. 4410.1700, subp. 7(C).

To persuade us otherwise, the Leech Lake Band relies on the supreme court's decision in *CARD* to assert that the city improperly relied on "the potential for ongoing regulatory authority to address the air-emissions impacts without considering what those impacts would be, let alone whether regulatory authority would implement mitigation measures that are 'specific, targeted, and are certain' to mitigate those effects." We disagree.

In *CARD*, the supreme court endorsed this court's approach that "a [responsible governmental unit] may not rest its EIS determination on 'mitigation' that amounts to only 'vague statements of good intentions.'" 713 N.W.2d at 834. The supreme court further stated: "it is not sufficient for a [responsible governmental unit] to release an EIS determination stating that it did not bother to investigate environmental effects because it was confident it could later pass regulations if any environmental harm occurred." *Id.* at 834-35. And the court concluded:

> When a [responsible governmental unit] considers mitigation measures as offsetting the potential for significant environmental effects under Minn. R. 4410.1700, it may reasonably do so only if those measures are specific, targeted, and are certain to be able to mitigate the environmental effects. The [responsible governmental unit] must have some concrete idea of what problems may arise and how they may specifically be addressed by ongoing regulatory authority. There is a definite difference between a [responsible governmental unit] review that approves a project with vague promises of future mitigation and a [responsible governmental unit] review that has properly examined a project and determined that specific measures can be reasonably expected to deal with the identifiable problems the project may cause.

Id. at 835.

Here, the city did not rely on vague notions of ongoing regulatory authority, as is prohibited by *CARD*, but rather on the robust air-emissions permitting scheme under the Clean Air Act. *See*, *e.g.*, *Sierra Club v. Otter Tail Power Co.*, 615 F.3d 1008, 1011 (8th Cir. 2010) (describing Clean Air Act permitting process); *In re Issuance of Air Emissions Permit No. 13700345-101 for PolyMet Mining, Inc.*, 955 N.W.2d 258, 261 (Minn. 2021) (referencing "exacting review process" under Clean Air Act). The city identified the

potential environmental impacts by specifying anticipated rates of pollutant emissions, and then properly relied on the specific measures required for issuance of an air-emissions permit. This analysis stands in contrast to the city's analysis of the wetlands-removal issue, where the city failed to explain how the anticipated NPDES permit would preserve public waters wetlands and downstream resources. And the analysis was consistent with Minnesota Statutes section 116D.04, subdivision 15, which seeks to avoid duplication in the EAW and permitting processes.

Still, the Leech Lake Band argues, the air-emissions permitting process does not apply to sulfur-dioxide emissions and the city was "required to consider the sensitivity of wild rice to sulfur dioxide and the cumulative potential effects of the proposed project combined with the Boswell facility." But the Band agrees that sulfur-dioxide emissions will be "relatively low" and does not respond to the city's statement that the project is unlikely to result in sulfur deposition on nearby resources. Moreover, nitrous-oxides emissions, the second part of the chemical reaction to form acid rain, will be regulated under the air-emissions permit.

On this record, we conclude that the Leech Lake Band has not met its burden to demonstrate that the city's determination—of no potential for significant environmental effects from air emissions—is unsupported by substantial evidence.

C. Substantial evidence in the record supports the city's determination that the project does not have the potential to cause significant environmental effects through timber harvesting.

Finally, the Leech Lake Band asserts that substantial evidence does not support the city's determination that timber harvesting to provide feedstock for the facility will not

have the potential for significant environmental effects. This is the most developed issue in the record, which reflects the following.

The EAW analyzed the impact of the project's requirement for feedstock on timber harvesting and forest sustainability in Minnesota. The EAW relies on a number of reports related to the sustainability of Minnesota's forests, including a Fiber Resources Evaluation, prepared by a consultant to assist Huber in selecting a location for its facility, and a letter-evaluation from Dr. Michael Kilgore, professor and head of the Department of Forest Resources at the College of Food Agricultural and Natural Resources Sciences at the University of Minnesota. The EAW concludes, based on the Fiber Resource Evaluation and Dr. Kilgore's letter, that "construction and operation of the proposed project is not anticipated to have the potential for significant environmental impacts on Minnesota forests." The EAW also addresses potential effects on tribal usufructuary rights,[15] reasoning that there were "several reasons to believe that the exercise of treaty rights is unlikely to be adversely effected." Among those reasons are state and federal regulations and practices regarding timber harvesting, which are protective of treaty rights. And the EAW references a number of initiatives identified by Dr. Kilgore as promoting sustainable forests in Minnesota.

[15] Usufructuary rights relate to the rights for others to use and enjoy, for a certain period, the fruits of another's property without damaging or diminishing it but allowing for any natural deterioration in the property over time. *Black's Law Dictionary* 1857 (11th ed. 2019) (defining usufruct). The treaty rights of tribes to hunt, fish, and gather on ceded lands are usufructuary rights. *See*, *e.g.*, *In re Enbridge Energy, Ltd. P'ship*, 964 N.W.2d 173, 206 n. 47 (Minn. App. 2021), *rev. denied* (Minn. Aug. 24, 2021).

The Minnesota Department of Natural Resources, which is charged with protecting natural resources including forests, offered technical corrections to the EAW's descriptions of certain department policies, but did not dispute the conclusions in the EAW or assert that an EIS was necessary on this issue. In a clarifying letter, the Department of Natural Resources explained that it "continue[s] to manage actively for a diverse mix of age classes, including older forests, using the approach identified in our Sustainable Timber Harvest Analysis."

In its comment on the EAW, the Leech Lake Band asserted that the project "would consume far more timber than our region can sustain, with significant negative effects on wildlife and treaty fisheries." It also asserted that the "project would result in the perpetuation and increase in the amount of young almost exclusively aspen forests," which would be detrimental to forest wildlife and vegetation.

In its responses to comments, the city disagreed with the Leech Lake Band's assertion that the project is not sustainable, explaining:

> It has been true for over a decade that timber harvest has been substantially less than new growth. [The Leech Lake Band] does not provide any contrary data. If the [Huber] project is constructed, and even if overall harvest increases on a 1 for 1 basis (meaning total harvest increases by 400,000 cords/year to match the facility's capacity), Minnesota's forests will still experience net growth of hundreds of thousands cords/year.

The city also reiterated that land managers making decisions about particular timber harvesting would be required to consider tribal interests. And it stated that "forests in Minnesota are expanding and aging and will continue to do so if the proposed project is approved."

Based on our review of the record on this issue, we conclude that there is substantial evidence in the record to support the city's determination that timber harvesting caused by the project does not have the potential for significant environmental effects.[16] In particular, Dr. Kilgore's letter describes policies and practices that are in place to ensure the health of Minnesota's forests. Dr. Kilgore explains that these practices "address the potential effects timber harvesting could have on important non-timber resources such as wildlife habitat, water quality, aesthetics, soil erosion, historic/cultural resources, rare, and endangered, or threatened species." And Dr. Kilgore states that Minnesota's sustainable harvest levels were "determined to be the highest annual harvest level that can be sustained not only from the standpoint of timber production but also a level that will sustain and perpetuate important non-timber values such as wildlife habitat, water quality, and soil productivity." Dr. Kilgore concludes by opining that "timber resources will be made available to [Huber]

[16] Both the city and Huber argue on appeal that the city was not required to consider the environmental impacts of third-party harvesting of timber that would be used for feedstock for the facility. In support of this argument, they rely on the supreme court's decision in *In re Minn. Power's Petition for Approval of EnergyForward Res. Package*, 958 N.W.2d 339, 348-49 (Minn. 2021) *(EnergyForward)*. In *EnergyForward*, the supreme court addressed the standard for determining whether a particular governmental decision was a "project" that could trigger environmental review under Minnesota Environmental Protection Agency. *Id.* at 346-47. The supreme court adopted a "reasonably close causal relationship" test for determining whether environmental effects would be caused by a governmental decision such that environmental review could be triggered. *Id.* at 349. In this case, there is no dispute that there is a project requiring some level of environmental review. At issue in this case is the standard in Minnesota Statutes section 116D.04, subdivision 2a(a), which requires preparation of an EIS "[w]here there is potential for significant environmental effects resulting from [the project]." Thus, *EnergyForward* is inapposite, and we reject the argument that the city was not required to consider the environmental impacts of timber harvesting caused by the project in determining whether an EIS would be required.

(and other users) in a sustainable, environmentally protective manner, and that the incremental consumption of fiber precipitated by the [Huber] project will not have the potential for significant environmental effects on Minnesota's forest resources."

On this record, we conclude that the Leech Lake Band has not met its burden to demonstrate that the city's determination—of no potential for significant environmental effects from timber harvesting—is unsupported by substantial evidence.

DECISION

In this appeal from the city's decision not to require an EIS, substantial evidence in the record supports the city's determinations that the project does not have the potential for significant environmental effects based on air emissions and timber harvesting. But the record lacks substantial evidence to support the city's determinations that an EIS is not mandatory under Minnesota Rule 4410.4400, subpart 20, based on elimination of public waters wetlands. The record also lacks substantial evidence to support the city's determination that planned wetlands filling does not have the potential for significant environmental effects. We therefore reverse the city's decision and remand for the city to issue a new decision on the need for an EIS.

Reversed and remanded.

JOHNSON, Judge (concurring in part, dissenting in part)

I concur in part II of the opinion of the court, but I respectfully dissent from part I. The issue in part I is whether an environmental impact statement (EIS) is mandatory based solely on the type of project that Huber intends to build. For two reasons, I respectfully disagree with the majority's interpretation of Minnesota Rule 4410.4400, subpart 20. I would conclude that the rule does not make an EIS mandatory in this case.

A.

The statute governing environmental review provides, as a general matter, that an EIS is required in a particular situation if "there is potential for significant environmental effects resulting from any major governmental action." Minn. Stat. § 116D.04, subd. 2a(a) (2022). The statute further provides that the Environmental Quality Board (EQB) "shall by rule establish *categories of actions* for which environmental impact statements . . . must be prepared." *Id.*, subd. 2a(b) (emphasis added). In essence, the statute authorizes the EQB to identify certain categories of actions or projects that, because of their nature and their general probability of causing a significant environmental impact, make an EIS mandatory, regardless of whether there actually is a "potential for significant environmental effects resulting from" the action or project. *See id.*, subd. 2a(a)-(b).

Pursuant to section 116D.04, subdivision 2a(b), the EQB has promulgated an administrative rule that identifies 28 categories of actions or projects for which an EIS is mandatory, regardless of whether there is a potential for significant environmental effects. *See* Minn. R. 4410.4400, subps. 2-28 (2021). When promulgating the mandatory-EIS rule, the EQB explained that the rule would "automatically require the preparation of an EIS,"

in contrast to the prior set of rules, under which "a project specific determination was required." Minn. Environmental Quality Bd., Statement of Need and Reasonableness for Proposed Environmental Review Program Rules 66 (1982) (1982 EQB SONAR). The EQB explained further that the mandatory-EIS rule was intended "to make the environmental review process more predictable and to expedite environmental review by moving directly into the EIS preparation stages and by avoiding lengthy challenges to the need for an EIS." *Id.*

As one might expect, the categories of actions or projects for which an EIS is mandatory are relatively substantial and consequential. The first three categories of actions or projects include "the construction or expansion of a nuclear fuel or nuclear waste processing facility," the "construction of a large electric power generating plant," and the "construction of a new petroleum refinery facility." Minn. R. 4410.4400, subps. 2A, 3, 4. The significance of these categories of projects corresponds to the reality that the "preparation and distribution of an EIS is neither swift nor inexpensive." *Citizens Advocating Responsible Development v. Kandiyohi Cnty. Bd. of Comm'rs*, 713 N.W.2d 817, 839 (Minn. 2006) (*CARD*) (G.B. Anderson, J., concurring).

Included in the list of 28 categories of actions or projects is the category at issue in this appeal: "projects that will eliminate a . . . public waters wetland." Minn. R. 4410.4400, subp. 20. For purposes of this appeal, the key word is "eliminate." The administrative rules do not define the word. *See* Minn. R. 4410.0200 (2021). Accordingly, it is necessary to interpret the rule, and we do so according to the same principles by which we interpret statutes. *See J.D. Donovan v. Minnesota Dep't of Transp.*, 878 N.W.2d 1, 5-6 (Minn.

2016); *CARD*, 713 N.W.2d at 825 n.9. In doing so, we refer to the common and ordinary meaning of words. *See T.G.G. v. H.E.S.*, 946 N.W.2d 309, 315 (Minn. 2020); *State v. Thonesavanh*, 904 N.W.2d 432, 436 (Minn. 2017).

Several well-respected dictionaries agree that the primary definition of the word "eliminate" is to "get rid of" or to "remove." *American Heritage Dictionary* 579 (5th ed. 2011); *Random House Dictionary of the English Language* 632 (2d ed. 1987); *Oxford Universal Dictionary* 594 (3d ed. 1964); *Webster's New Int'l Dictionary* 832 (2d ed. 1934). Similarly, another dictionary defines the word to mean "to cause the disappearance of." *Webster's Third New Int'l Dictionary* 736 (1961). None of these dictionaries includes a definition that suggests that "eliminate" means to change a thing—without getting rid of it or removing it or causing it to disappear—so that the thing has different characteristics or a different legal status.

If the EQB had intended to make an EIS mandatory based solely on a wetland's reduction in size or change in type, the EQB somehow would have described those concepts. For example, the EQB could have promulgated a mandatory-EIS rule that applies to "projects that might cause a public waters wetland to no longer satisfy the size requirement or the type requirement of a public waters wetland." But the EQB did not promulgate such a rule. Instead, the EQB chose to use a simple, ordinary, well-understood word—"eliminate"—to determine whether an EIS is mandatory with respect to a public waters wetland.

It is significant that the EQB *has* promulgated a rule that describes the concepts of a wetland's reduction in size or change in type, and that rule merely makes an EAW (not

an EIS) mandatory. The rule applies to "projects that will change or diminish the course, current, or cross-section of one acre or more of any public water or public waters wetland." Minn. R. 4410.4300, subp. 27(A) (2021).[1] For any such project, an EAW is mandatory. Minn. R. 4410.4300, subp. 1. The distinction between the language used in the mandatory-EIS rule and the language used in the mandatory-EAW rule further indicates that, in context, the word "eliminate" in the mandatory-EIS rule does *not* mean reducing the size or changing the type of a public waters wetland.

This understanding of the two rules is confirmed by the history of their promulgation. Before 1982, an EAW (but not an EIS) was mandatory for any "action that *will eliminate or significantly alter* a wetland of Type 3, 4, or 5 . . . of five or more acres in the seven-county metropolitan area, or of 50 or more acres outside the seven-county metropolitan area, either singly or in a complex of two or more wetlands." 6 Minn. Code Agency R. § 3.024B(1)(r) (1977) (emphasis added). In 1982, the EQB essentially replaced former rule 3.024B(1)(r) with two new rules—one mandating an EAW and one mandating an EIS. *See* 6 Minn. Code Agency R. §§ 3.038Z, 3.039S (1982). The rule mandating an EAW based on a change to a wetland used the "change or diminish the . . . cross-section" language that now appears in Minn. R. 4410.4300, subp. 27(A) (2021). *See* 6 Minn. Code Agency R. § 3.038Z (1982). The rule mandating an EIS with respect to a wetland used the

[1]A reduction in the surface area of a public waters wetland inevitably would change the wetland's cross-section. *See State v. Kuluvar*, 123 N.W.2d 699, 705 (Minn. 1963) (interpreting and applying similar language in Minn. Stat. § 105.42). Similarly, an increase or decrease in the water depth of a public waters wetland, which might result in a change in type, would change the cross-section of the wetland. *See* Minn. Stat. § 103G.005, subd. 17b(1)-(8) (2022).

word "eliminate," which has been retained in Minn. R. 4410.4400, subp. 20 (2021). *See* 6 Minn. Code Agency R. § 3.039S (1982). At the time of promulgation, the EQB explained that the one-acre threshold in the mandatory-EAW rule (which has been retained in Minn. R. 4410.4300, subp. 27(A)) was reasonable "because an alteration of one acre is likely to affect the total aquatic ecosystem." 1982 EQB SONAR, *supra*, at 154. The EQB also explained that the then-new mandatory-EIS rule was reasonable because the "elimination" of a protected wetland "would have significant local and regional impacts." *Id*. The EQB's simultaneous promulgation of the two rules and its accompanying comments indicate that the board intended to prescribe different consequences for the elimination of a wetland and for the alteration of a wetland that does not result in its elimination.

Thus, I would interpret rule 4410.4400, subpart 20, according to the common and ordinary meaning of the word "eliminate" such that an action or project eliminates a public waters wetland only if the action or project gets rid of or removes it or causes it to disappear. *See American Heritage Dictionary*, *supra*, at 579; *Random House Dictionary of the English Language*, *supra*, at 632; *Oxford Universal Dictionary*, *supra*, at 594; *Webster's Third New Int'l Dictionary*, *supra*, at 736; *Webster's New Int'l Dictionary*, *supra*, at 832. If I were to assume that the rule is ambiguous, I would resolve the ambiguity by referring to the rulemaking history, which reveals that an alteration to a wetland that continues to exist makes an EAW, but not an EIS, mandatory.

B.

Even if the word "eliminate," as used in rule 4410.4400, subpart 20, is interpreted to mean that a wetland is deprived of either of the two qualifying characteristics of a public waters wetland (acreage and type), an EIS is not mandatory in this case.

The Leech Lake Band of Ojibwe concedes that the two wetlands at issue will not be reduced in surface area to less than two and one-half acres. The Band contends only that the construction of Huber's facility might change the type or types of the two wetlands such that either wetland might no longer be a "public waters wetland." The Band asserts that the wetlands "*could* change to different types *if* the changes caused by the proposed project cause changes to their hydrology or vegetation." (Emphasis added.) The Band elaborates by stating that "wetlands *can be* changed by many stressors, including human modifications to hydrology such as pipes or channels, changes to the ground or surface waters that feed into the wetland, loss of nearby wetlands, and changing vegetation." (Emphasis added.)

The Band's contention fails as a matter of law because rule 4410.4400, subpart 20—unlike section 116D.04, subdivision 2a(a)—does not depend on an analysis of the *potential* consequences of a proposed action or project. Rule 4410.4400, subpart 20, applies only to "projects that *will* eliminate a public water or public waters wetland," Minn. R. 4410.4400, subp. 20 (emphasis added), but not to projects that *might* cause a change *if* certain future events occur. As stated above, the mandatory-EIS rule was intended to "automatically require the preparation of an EIS" based on the nature of an action or project rather than to require "a project specific determination." 1982 EQB SONAR, *supra*, at 66. In essence,

rule 4410.4400, subpart 20, makes an EIS mandatory only if the prerequisites of the rule are triggered by an action or project *as designed*.

The record in this case contains substantial evidence that Huber's project will *not* change the type of either wetland at issue. In response to the Band's comments, the city's environmental consultant stated, "The type and function of the remaining acreage of the public waters wetlands *will not change*, because excess stormwater will be appropriately managed under the facility's NPDES permit." (Emphasis added.) The consultant further stated, "Wetland No. 26 and 27 areas not permanently impacted by the project *will retain their pre-construction delineated wetland type*." (Emphasis added.) The consultant's statements concerning the two wetlands constitutes substantial evidence because, among other reasons, a reasonable person would accept the statements as adequate to support a conclusion. *See Minnesota Ctr. for Environmental Advocacy v. Minnesota Pollution Control Agency*, 644 N.W.2d 457, 464 (Minn. 2002).

Thus, even under the majority's interpretation of the word "eliminate," an EIS is not mandatory under rule 4410.4400, subpart 20.

C.

Before concluding, I wish to comment on the court's resolution of the Band's two other arguments for reversal.

First, I join in part II of the opinion of the court while recognizing that the issue in subpart II.A. presents a close call. The applicable caselaw is quite deferential to a responsible governmental unit's determination that substantial evidence supports a negative declaration of the need for an EIS, and this deference extends to the information

on which a decision is based. In *CARD*, for example, the supreme court concluded that substantial evidence supported a county's decision based on apparently simple statements of the county's director of environmental services and an employee of the state department of health. 713 N.W.2d at 833. In this case, the record includes not only the EAW but also the city's detailed, 71-page document responding to public comments, which was prepared by the city's environmental consultant. If this court were to conclusively determine that an EIS is required, I might disagree with that determination. But I join in the court's decision to remand the matter discussed in subpart II.A. to the city with instructions to further consider the potential for significant environmental effects resulting from the project's wetlands-removal plan, gather additional information if necessary, and make another decision on the need for an EIS.

Second, I join in footnote 7, which is in part I of the opinion of the court. In that footnote, the court rejects the Band's first argument, that an EIS is mandatory under rule 4410.4400, subpart 11. I agree that the Band's argument fails because the record contains abundant evidence of "written offer[s] of financial incentives." *See* 2021 Minn. Laws 1st Spec. Sess. ch. 6, art. 2, § 129.

In sum, I concur in part II of the opinion of the court, but I respectfully dissent from part I because I would affirm the city's decision in all other respects.